THE JUDGES' JUDGE

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In this generation the various elements of the legal community have perceived Henry Friendly as quintessentially the lawyers' lawyer, the judges' judge, and the scholars' scholar. It is a phenomenon with no precise counterpart in our national legal history. And it is something that might not have happened at all, because his brilliant performance as an undergraduate at Harvard College in historical studies held out the promise of a great academic career in an area he had found to be personally very congenial. Fortunately and, so it is said, with some external persuasion brought to bear, his attention was finally and firmly focused on the law, all to the greater glory of that profession. The story is that Felix Frankfurter, hoping to save this extraordinary undergraduate for the Harvard Law School, finally persuaded him to try the law school for just one year, certain that this stratagem would do the job—as it did.

Although long aware of his legal eminence, I first became personally acquainted with Judge Friendly when, still a practicing lawyer in Chicago, I became a member of the Council of the American Law Institute and attended its biennial meetings in New York City. The function of that body was to scrutinize carefully the Restatement drafts prepared by the expert Reporters with the help of their respective Advisory Committees, and to clear them for consideration by the members of the Institute as a whole. From the first I was quick to note the degree to which Judge Friendly had, despite his judicial burdens, done his homework, and how his participation in the discussions invariably resulted in clarification and improvement of the texts being examined. It is a contribution that he continues to make, and the Institute's output is steadily and surely enriched thereby.

My first opportunity, however, to work with Judge Friendly at closer range and on a more personal basis came a few years after I had become a federal court of appeals judge myself. In 1972 I was designated to serve for a week as a visiting judge on the Second Circuit, and was especially gratified to find that Judge Friendly would preside over the panel on which I was to sit. All of my favorable expectations were more than borne out, and I learned a lot about such things as how to assure the usefulness of oral argument and formulate the precise ques-

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tions requiring resolution.

That sitting eventuated, however, in what I continue to believe to be the most challenging opinion-writing assignment I have had in my judicial life to date. The last case we heard was an appeal from a judgment of the district court granting retroactive monetary damages to welfare recipients in New York who claimed that they had been paid less than they were entitled to under the applicable laws and regulations, including those of a federal provenance because of the grants-in-aid made by Congress for relief assistance, administered by the New York State welfare agency. It was contended that the suit in truth was against the state of New York, and therefore one that could not be pursued in a federal court because the eleventh amendment of the United States Constitution provides that the federal judicial power does not extend to suits against a state.

In the conference following oral argument, the vote was to reverse, but with some uncertainty on all sides as to just how—or whether—the eleventh amendment operated in this case. I accepted the writing assignment, but urged that we continue our conference discussion of the eleventh amendment because I needed all the help I could get on that question. Judge Friendly, however, flatteringly but firmly suggested that the matter be left in my hands without further ado. I recognized that he was engaging in an old ploy we all use on those occasions when we want to see how persuasive the opinion is after it is actually written, at which time an earlier vote of a tentative nature can be reexamined and perhaps changed.

The result was that I found myself back in Washington devoting most of the summer to this opinion, Judge Friendly being at the time on one of the European holidays in which he so delights. The job was complicated by two facts. First, I had not involved either of my law clerks in the Second Circuit sitting, since it came at a time when they were completing their terms, and thus I was entirely on my own. Second, there was always pressing in upon me the fact that my son-in-law was starting his clerkship year with Judge Friendly in September, and I did not relish the prospect of the Judge's thinking after reading my proposed opinion that the boy might be all right but his father-in-law was perhaps in the wrong business.

As it turned out, my anxieties were groundless. My colleagues concurred in the opinion,[1] and the Supreme Court denied certiorari. Not long thereafter the Seventh Circuit decided the same issue contra-

[1] Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied,* 411 U.S. 921 (1973).

rily, and explicitly characterized as "unpersuasive" the Second Circuit opinion. Because of the conflict, the Supreme Court took the Seventh Circuit case and ultimately reversed it in an opinion adopting our approach.[2] That approach has since been made by the Court a basic principle of eleventh amendment law.[3]

Thus my ordeal not only turned out all right, but fostered a deepening of my personal relationship with Judge Friendly. He gave me a chance to see what I could do with a tough legal problem, and no junior judge can be anything but grateful for such treatment by a senior colleague of established eminence.

My next opportunity to serve on the same court with Judge Friendly came a few years later, when Congress enacted the Regional Rail Reorganization Act of 1973.[4] That statute had as its objective the bringing together as a single unit the numerous eastern railroads then individually in the bankruptcy reorganization courts. The new law created a new court—the Special Railroad Court—to handle litigation arising under it.[5] It provided that the three judges of the Special Court were to be appointed by the Chief Judge of the Panel on Multidistrict Litigation.

I first heard about the new court when I received a telephone call from Judge John Wisdom, who headed the multidistrict panel. He said only that he wished to appoint me, but added in the next breath that I should not say anything but wait for a telephone call that would be coming in from Judge Friendly within five minutes.

As I waited for that call I wondered if there might not be some problems about an active judge, carrying a full share of the load of a busy court, being able to take on the extra duties of the Special Railroad Court. But when Judge Friendly called and urged me to accept the appointment, I thought that it would do me no good to raise that question, since Judge Friendly was still an active judge himself. Thus, I succumbed to his request that I accept the appointment because, as he put it, he wanted "someone to talk to who knew something about railroads," I having served as general counsel of a railroad as a part of my law practice in Chicago. A few days later I read in the *New York Times* that Judge Friendly had taken senior status—a timing that, because of his great productive capacities, I had no reason to believe to be related

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[2] Edelman v. Jordan, 415 U.S. 651 (1974), *rev'g* 472 F.2d 985 (7th Cir. 1973).

[3] Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 911 (1984).

[4] Pub. L. No. 93-236, 87 Stat. 985 (1973) (codified as amended 45 U.S.C. §§ 701-794 (1982)).

[5] Pub. L. No. 93-236, 87 Stat. 985, 999 (1973) (codified at 45 U.S.C. § 719 (1982)).

to the advent of the Special Railroad Court—as already had Judge Thomsen of Baltimore, who was the third appointee.

Putting aside for the time being my concern for the problems I might have because of my own continuing commitment as an active judge to my own court, I embarked enthusiastically on my duties, especially since they afforded me a second—and more prolonged—chance to sit with Judge Friendly. It appeared that the first phase of litigation under the new act would be principally concerned with the question of its constitutionality. This proved to be the case, and two years or more were consumed by consideration of these questions.[6] In the event, our affirmative rulings on constitutionality also prevailed in the Supreme Court in consolidated appeals coming up to it from the individual reorganization courts.[7] For me the most important thing was that I had the happy and valuable experience of sitting with—and constantly learning from—Judge Friendly.

The second phase of litigation under the Act had to do mainly with the very difficult questions inherent in the valuation of railroad properties and securities.[8] Having no option to take senior status, I resigned my post on the Special Railroad Court, but I did follow as an observer the heroic efforts which Judge Friendly made to illuminate and to dispose of these questions in an elaborate series of Special Court opinions issued over several years.

The results speak for themselves in terms of the magnitude of his accomplishment. The individual bankrupt railroads were brought together in one unit—Conrail—which has been so surprisingly successful that the government currently has before it several quite substantial competing purchase offers by private interests, thereby restoring to the government some of the public funds expended by it to implement the statute. I am sure that no judge who sat on the Special Court, and no lawyer who took part in the litigation, would ever believe that this could have happened except for Henry Friendly. Among his many conspicuously successful judicial achievements, this one will stand out as a remarkable demonstration of the skill and imagination which he can bring to bear upon any subject matter, despite its complex and specialized nature.

Instructive as they invariably are, it is not by his judicial opinions

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[6] *See, e.g., In re* Penn Cent. Transp. Co., 384 F. Supp. 895 (Regional Rail Reorg. Ct. 1974).

[7] Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

[8] *See, e.g., In re* Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act, 439 F. Supp. 1351 (Regional Rail Reorg. Ct. 1977).

alone that Judge Friendly has made such a deep imprint upon the law. He leads a separate life as a creative scholar whose research and writing have time and again enriched our legal literature and informed our understanding of important areas of the law. The list of his resulting publications is as formidable in length as it is impressive in scope.

And it continues to increase. I have at hand a lecture given by him not long ago at Emory University and published in the *Emory Law Journal.* Entitled "Indiscretion About Discretion," it is a fresh and penetrating analysis of the perennial problem of appellate review of trial court rulings in areas commonly characterized as discretionary.[9] It is a problem with which judges are constantly confronted, and there are real dangers of rule by rote displacing careful issue-by-issue analysis. Judge Friendly's subject in this instance has none of the glamour of constitutional adjudication, but it ventilates a subject that, however lacking in drama, is constantly claiming the courts' attention and where nothing could be more useful than a close look by such a keen observer as Judge Friendly.

It is understandably easy, but highly mistaken, to allow the image of Judge Friendly the man of law to overlay too heavily that of Judge Friendly the man. The truth of that was never made more clear to me than it was a year ago, when I was again sitting by designation on the Second Circuit. Judge Friendly was not on the panel with me, but the chambers I used were directly across the hall from his. One day after my day's sitting was ended, he kindly suggested that we walk out somewhere for lunch. This resulted in a long and leisurely talk-fest, which I shall never forget. It ranged widely over many subjects, of which the law was only one. It revealed to me as never before the dimensions and diversity of Henry Friendly's intellectual and cultural universe. It is a world in which any serious inquiry made by him will contribute to both the pleasure and profit of his fellow citizens. We of the law are the most numerous—but not the only—beneficiaries of that fact.

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[9] Friendly, *Indiscretion About Discretion,* 31 EMORY L.J. 747 (1982).